Error to Circuit Court, Russell County.

Action by E. S. Smith against Walter Fletcher and A. L. Grizzle. Judgment for plaintiff. Motion by the first-named defendant to quash an execution obtained in the name of the plaintiff by the last-named defendant, who had paid the judgment, was denied, and the former brings error. Judgment amended by quashing execution and as amended affirmed.

W. W. Bird, of Lebanon, for plaintiff in error.

H. A. Routh, of Lebanon, for defendants in error.

MANKIN *v.* ALDRIDGE.

Sept. 16, 1920.

[105 S. E. 459.]

1. **Judgment (§ 184*)—Notice in Proceeding by Motion Must Set Out Matter Sufficient to Maintain Action.**—In a proceeding by motion for judgment under Code 1919, § 6046, the notice takes the place of the writ and the declaration, and must set out matters sufficient to maintain the action, and what is lacking in allegation cannot be supplied by evidence, and there must be both allegation and proof to entitle plaintiff to a judgment, and the allegation must precede the proof.

2. **Judgment (§ 184*)—Sufficiency of Notice in Proceeding by Motion Tested by Demurrer.**—Whether a notice in a proceeding by motion under Code 1919 § 6046, sets out matters sufficient to maintain the action is tested by a demurrer to the notice.

3. **Judgment (§ 184*)—Procedure by Motion Looked upon with Great Indulgence Regarding Sufficiency of Notice.**—The Procedure by motion under Code 1919 § 6046, is looked upon with great indulgence, and notices are upheld as sufficient, however informal, where they contain sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him, and state sufficient facts to enable the court to say that if the facts stated are proved the plaintiff is entitled to recover.

4. **Pleading (§ 48*)—Test as to Sufficiency of Declaration.**—Declarations are upheld as sufficient where they contain sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him, and state sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover, but less than this will be insufficient, notwithstanding Code 1919, §

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*For other cases see same topic and KEY-NUMBER in all Key Numbered Digests and Indexes.

6085, declaring that no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause.

5. Judgment (§ 184*)—Account May Be Incorporated in Notice in Proceeding by Motion.—In a proceeding by motion under Code 1919, § 6046, where notice stated that judgment would be asked for a certain sum, "that being a balance due me from you on account, a copy of which is hereto attached," the account, being thus incorporated in the notice, would supply to the notice any matter stated in the account.

6. Judgment (§ 184*)—Overruling Demurrer to Notice Proper, Where Sufficient as to Part of an Account Sued upon.—Where a notice in a proceeding by motion under Code 1919, § 6046, was sufficient as to a part of an account sued upon, it was proper to overrule a demurrer, the situation being analogous to a demurrer to a declaration as a whole, where the declaration contains serveral counts, some of which are good and others bad.

7. Judgment (§ 184*)—Notice in Proceeding by Motion Held Insufficient to Support Judgment as to Uncertain Item in Account.—Where an item in an account incorporated in a notice in a proceeding by motion under Code 1919, § 6046, was simply, "15,500 staves Long Branch $6.00 per M. $93.00," a judgment for the plaintiff including such item cannot stand on evidence that the item related to the hauling of staves, such item being too uncertain.

8. Judgment (§ 184*)—Court Erred in Not Requiring Plaintiff to File Bill of Particulars.—In a proceeding by motion under Code 1919, § 6046, where notice incorporated an account containing such items as, "15,500 staves Long Branch $6.00 per M. $93.00," court erred in not requiring a bill of particulars of plaintiff on demand by the defendant under Code 1904, § 3249 (Code 1919, § 6091); such items being uncertain.

9. Judgment (§ 184*)—No Error in Permitting Amendment Pending Examination as Witness.—In a proceeding by motion under Code 1919 § 6046, where an item of an account contained the words "Long Branch" to designate a tract from which hauling of staves was done, the court did not err, pending examination of plaintiff as a witness, in permitting plaintiff to change the words to "Laurel Branch," being a mere immaterial misnomer of the tract, which did not in any way take the denfendant by surprise; there being no tract by the name of "Long Branch."

10. Evidence (§ 242 (5)*)—Servants Have No Power to Make Admission in Behalf of Master.—In an action to recover for hauling staves by count, plaintiff could not testify as to the number of staves

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

hauled as told to him by men sawing and stacking for defendant by the thousand, as the latter were servants of the defendant, and not his agents, and had no power to make admissions in his behalf.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc.- Dig. 346]

11. Witnesses (§ 255 (10)—Witness May Testify from Memory After Refreshing Recollection from Any Paper.—No matter by what kind of paper the recollection of a witness is refreshed, if, after being refreshed, he speaks from a present and existing recollection, and not from the source of refreshment, his testimony is admissible.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 964]

12. Guaranty (§ 92 (2)*)—Instructions Held Insufficient, Where Defendant Claimed to Be Only a Guarantor.—In an action for services, where defendant claimed that he was only a guarantor, an instruction that if the jury "believe by a preponderance of the evidence that the defendant agreed with the plaintiff that if he would do the work he, the defendant, would pay him for same, etc., then they should find for the plaintiff," although correct, should have gone further and explained to the jury the distinction between an agreement to "pay him for the same" and to "see him paid for the same."

13. Frauds, Statute of (§ 160*)—Error to Refuse to Apprise Jury that if Undertaking Is Secondary It Must Be in Writing.—Where defendant let a contract for hauling staves and plaintiff was sublet a part of the work, and defendant claimed that he agreed to "see him paid for the same," court erred in refusing to bring to the attention of the jury the necessity for a writing if the undertaking of the defendant was merely secondary.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 519]

14. Trial (§ 191 (1)*)—Requested Instruction, Assuming Controverted Fact, Properly Refused.—Court did not err in refusing an instruction, assuming as a fact what was seriously controverted by the testimony,

[Ed Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 992]

15. Account, Action on (§ 7*)—Burden of Proof upon Plaintiff.—In an action on an account, the burden is upon the plaintiff to prove his case by a preponderance of the evidence as to each item therein.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 9]

Error to Circuit Court, Dickenson County.

Proceeding by motion by F. M. Aldridge against Speed Mankin. Judgment for the former, and the latter brings error. Reversed and remanded.

S. H. & Geo. C. Sutherland, of Clintwood, for plaintiff in error.

A. A. Skeen, of Clintwood, for defendant in error.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.